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Confrontation after *Crawford*

The following edited excerpt, drawn from "The Confrontation Clause Re-Rooted and Transformed," 2003-04 Cato Supreme Court Review 439 (2004), by Law School Professor Richard D. Friedman, discusses the impact, effects, and questions generated by the U.S. Supreme Court's ruling in *Crawford v. Washington* last year that a defendant is entitled to confront and cross-examine any testimonial statement presented against him. In *Crawford*, the defendant, charged with attacking another man with a knife, contested the trial court's admission of a tape-recorded statement his wife made to police without giving him the opportunity to cross-examine. The trial court admitted the statement, and the appeals court upheld the conviction.

When *Crawford* was argued before the U.S. Supreme Court in November 2003, the guiding principle for two decades had been that "the U.S. Supreme Court has tolerated admission of out-of-court statements against the accused, without cross-examination, if the statements are deemed 'reliable' or 'trustworthy,'" according to Friedman. But in *Crawford*, "the Supreme Court did a sharp about-face, holding that a 'testimonial' statement cannot be admitted against an accused, no

matter how reliable a court may deem it to be, unless the accused has had an adequate opportunity to cross-examine the witness who made the statement."

"Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the states flexibility in their development of hearsay law — as does *Roberts* [*Roberts v. Ohio*, 448 U.S. 56 (1980)], and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether," Justice Antonin Scalia wrote for the Court in *Crawford*. "Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"

"*Crawford* is not only a vindication of the rights of the accused, but a victory for fidelity to constitutional text and intent," Friedman writes in the article from which this excerpt is taken. "And yet the decision leaves many open questions, and all lawyers involved in the criminal justice process will have to adjust to the new regime that it creates."

Crawford reflects a paradigm shift in the doctrine of the Confrontation Clause. Nonetheless, *Crawford* and *amici* went to some pains to assure the Supreme Court that adoption of the testimonial approach would alter the results in few, if any, of the Court's own precedents. A considerable number of decisions in the lower courts, however, would come out differently under *Crawford*. To set the groundwork for understanding how *Crawford* alters the doctrinal landscape and the important issues that are likely to arise, it will first help to examine several respects in which *Crawford* does not change the law.

First, under *Crawford*, as before, a statement does not raise a confrontation issue unless it is offered to prove the truth of a matter that it asserts. This is the rule of *Tennessee v. Street* [471 U.S. 409, 414 (1985)], which *Crawford* explicitly reaffirms. In *Street* itself, for example, the defendant contended that the police coerced him to make a statement similar to that of an accomplice's confession. The Court ruled unanimously that the prosecution therefore could introduce the accomplice's confession to demonstrate not that it was true but that it was substantially different from the defendant's. That result would be unchanged under *Crawford*. There may be questions as to how far a prosecutor may take this "not for the truth" argument. For example, if the prosecutor argues that the statement is being offered as support for the opinion of an expert witness, in some cases that might be considered too thin a veneer. Nonetheless, the basic doctrine remains in place.

Second, many statements that were admissible under *Roberts* will still be admissible under *Crawford*, though the grounds of decision will be different. The question is not, as some analysts have posed it, whether *Crawford* preserves given hearsay exceptions. The rule against hearsay and the Confrontation Clause are separate sources of law — and *Crawford* stops the tendency to meld them. The question for Confrontation Clause purposes in each case is whether the given statement is testimonial. The fact that a statement fits within a hearsay exception does not alter its status with respect to that question.

But one can say that most statements that fit within certain hearsay exceptions are not testimonial. For example, under *Roberts*, business records and conspirator statements were deemed reliable because they fell within "firmly rooted" hearsay exemptions. Under *Crawford*, almost all such statements will be considered non-testimonial, and therefore the Confrontation Clause will impose little, if any, obstacle to their admissibility.

Third, the rule of *California v. Green* [399 U.S. 149 (1970)] also is preserved. As the *Crawford* Court summarized the rule, "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."

In my view, the rule is a dubious one. It fails to take into account the serious impairment of the ability to cross-examine that arises when a witness' prior statement is admitted and the witness does not re-assert its substance, effectively walking away from it. But the Court has shown no inclination to modify the rule. Indeed, it was reinforced by Justice Scalia himself in *United*

States v. Owens [484 U.S. 554 (1988)], a case involving a witness whose severe head injuries destroyed much of his memory — and it now becomes more important than ever for prosecutors. If a witness makes a statement favorable to a prosecutor, but the prosecutor is afraid that the witness will not stand by the statement at trial, the prosecutor should not argue that the statement is "reliable." Rather, the prosecutor should bring the witness to trial, or otherwise ensure that the defendant has had an adequate opportunity for cross. If the witness reaffirms the substance of the prior statement, all is well and good for the prosecutor. If she testifies at variance from the statement, then the Confrontation Clause does not bar admissibility of the statement.

Fourth, in applying *Roberts*, the Court developed a body of case law concerning what constitutes proof of unavailability (assuming the given statement can be introduced only if the declarant is unavailable), and that case law — including part of *Roberts* itself — is left untouched, for better or worse. At argument in *Crawford*, the chief justice asked what impact the testimonial approach would have on *Mancusi v. Stubbs* [408 U.S. 204 (1972)], a key case in this line and one in which he wrote the majority opinion. The proper answer is simple: None at all.

Fifth, *Crawford* explicitly preserves the principle that the accused should be deemed to have forfeited the confrontation right if the accused's own misconduct prevented him from having an adequate opportunity to cross-examine the witness. The right may be forfeited, for example, if the accused murdered or intimidated the witness. The forfeiture principle may take on greater importance under *Crawford*, as explained below.

Sixth, the rule of *Maryland v. Craig* [497 U.S. 836 (1990)] is unchanged, at least for now. In that case, the Court held that, upon a particularized showing that a child witness would be traumatized by testifying in the presence of the accused, the child may testify in another room, with the judge and counsel present but the jury and the accused connected electronically. *Crawford* addresses the question of when confrontation is required; *Craig* addresses the question of what procedures confrontation requires. The two cases can coexist peacefully, and nothing in *Crawford* suggests that *Craig* is placed in doubt. And yet, Justice Scalia dissented bitterly in *Craig*. The categorical nature of his opinion in *Crawford* squares better with his *Craig* dissent than with Justice O'Connor's looser majority opinion in *Craig*, and presumably he would welcome the opportunity to overrule *Craig*. Whether he would have the votes is an open question.

Finally, *Crawford* leaves intact the final succor of prosecutors, the rule that a violation of the confrontation right may be harmless and therefore not require reversal.

Changes and open questions

That *Crawford* leaves much of the *status quo ante* unchanged does not gainsay that it changes a great deal, and not just the conceptual framework of the Confrontation Clause. Here I will address respects in which *Crawford* does change the law, questions that it leaves open, and adjustments to existing law that might be adopted in its wake.

A. The basic change

Most fundamentally, of course, *Crawford* ends the prosecutorial use of testimonial statements made to police in circumstances where the accused cannot confront his accuser. That means that when a prosecutor attempts to introduce a testimonial statement made by a person who is not a witness at trial, the prosecutor will not be able to argue that the statement should be admitted because it is reliable. Unless the accused either has had the opportunity to cross-examine the declarant, or has forfeited the right to confront her, the statement cannot be admitted.

Thus, to take an obvious example, some courts have been willing to admit grand jury testimony given by a witness who is not available at trial, persuading themselves that various factors — including the fact that the testimony was given under oath — are in the aggregate sufficiently strong “particularized guarantees of trustworthiness” to excuse the absence of an opportunity for cross-examination. *Crawford* means that this practice must stop. Similarly, station-house statements, of the type involved in *Crawford* itself, and statements made in plea hearings may not be introduced by the prosecution unless either the witness testifies at trial or she is unavailable and the accused has had an opportunity to cross-examine her. Courts have already begun to apply cases consistently with these principles. In one Detroit murder case pending on appeal when *Crawford* was decided, the prosecutor has since confessed error, because the conviction depended in part on statements made to a polygraph examiner by a friend of the accused. Consider also *United States v. Saner* [313 F. Supp. 2d 896 (S.D. Ind. 2004)], a post-*Crawford* decision in which the accused, a bookstore manager, objected to admission of a statement by a competitor, made to a Justice Department lawyer and paralegal, that the two managers had fixed prices. The Court held, properly, that because the accused had not had a chance to cross-examine the competitor, who asserted the Fifth Amendment privilege at trial, *Crawford* precluded admissibility of the competitor’s statement.

B. The meaning of “testimonial”

The most significant question that arises, of course, is how far the category of “testimonial” statements extends.

1. Standards

The *Crawford* Court did not have difficulty in concluding that Sylvia’s [the defendant’s spouse’s] statement was testimonial: “Statements taken by police officers in the course of interrogations,” as Sylvia’s was, are “testimonial under even a narrow standard.” As the Court elaborated:

“Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.”

So much for the core. The boundaries of the category will have to be marked out by future cases. The Court quoted three standards without choosing among them:

- “*Ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially”;
- “Extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions”; and
- “Statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”

I believe the third of these is the most useful and accurate. It captures the animating idea behind the Confrontation Clause — the prevention of a system in which witnesses can offer their testimony in private without cross-examination. In some cases, under this view, a statement should be considered testimonial even though it was not made to a government official.

It is by no means certain that this standard will ultimately prevail. Some language in *Crawford* emphasizes the role of government officers in creating testimony. For example, having used the term “interrogation,” the Court takes care to note that Sylvia’s statement, “knowingly given in response to structured police questioning, qualifies under any conceivable definition”; at another point, it noted that “[i]nvolvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse.” This emphasis on government involvement might suggest that the Court will stick closely to a minimalist definition of testimonial statements.

That would be a mistake, however. I do not believe that participation by government officials in creation of the statement — either receipt of it as its initial audience or active procurement of it through interrogation — is the essence of what makes a statement testimonial.

The confrontation right was recognized in older systems in which there was no public prosecutor, and victims or their families prosecuted crimes themselves. The idea behind the confrontation right is that the judicial system cannot try an accused with the aid of testimony by a witness whom the accused has not had a chance to confront. The prosecutor plays no essential role in the violation.

Thus, if just before trial a person shoved a written statement under the courthouse door, asserting that the accused did in fact commit the crime, that would plainly be testimonial even though no government official played a role in preparing the statement. One ground for hope in this respect is that *Crawford* itself noted that one of the statements involved in the notorious *Raleigh* case was a letter.

In some cases a problem that nearly is the reverse arises — an investigative official may be seeking to procure evidence, but the declarant may not understand this. I believe that in the usual case the investigator’s anticipation should not alter characterization of the statement. If the declarant does not recognize she is creating evidence that may be used in a criminal proceeding, then the nature of what she is doing in making the statement is not testimonial.

Thus, a conversation between criminal confederates, with no anticipation of a leak to the authorities, is not ordinarily testimonial, and if in fact the authorities are surreptitiously recording the conversation, that should not change the result. On the other hand, investigators probably should not be allowed to disguise their intent gratuitously — that is, for the purpose of defeating the confrontation right. Accordingly, even apart from a standard like the third one quoted above, perhaps a statement should be considered testimonial in what might be called an “invited statement” context in which the statement fits a description such as this:

Before the statement is made, (1) a recipient of the statement anticipates evidentiary use of the statement, but does not inform the declarant of this anticipation, and (2) the prosecution does not demonstrate that disclosure of anticipation of evidentiary use would have substantially diminished the probability that the declarant would have made the statement.

The idea behind the second prong of such a test would be that if disclosing the recipient’s investigatory activity would not inhibit the declarant from making the statement, then the disclosure probably ought to be made; on the other hand, if the disclosure would likely prevent the statement from being made, then the investigator has sufficient reason for declining to make a disclosure. This rule seems to me to have some merit, but it may be too complicated to be applied satisfactorily.

2. Special cases

Many cases will arise, in a wide variety of circumstances, in which it is a close question whether a statement should be deemed testimonial. I will address here two of the most important recurring types of cases.

a. When are 911 calls testimonial?

Consider first the example of statements made in calls to 911 operators. In recent years, courts have often admitted these statements — most characteristically, by complainants in domestic violence cases — even though the caller has not testified in court. Under *Crawford*, this practice would not be allowed if the statement is deemed “testimonial.” The extent to which these calls are “testimonial,” however, is an open question.

The court in one post-*Crawford* case [*People v. Moscat*, 777 N.Y.S. 2d 875 (N.Y. Crim. Ct. 2004)], in justifying its decision that statements in 911 calls should not be deemed testimonial, declared:

“Typically, a woman who calls 911 for help because she has just been stabbed or shot is not contemplating being a ‘witness’ in future legal proceedings; she is usually trying simply to save her own life.”

This generalization fits some cases, but not all. In some cases, the caller does not perceive that she is any longer in immediate danger, and the primary purpose of the call is simply to initiate investigative and prosecutorial machinery. Indeed, often the call occurs a considerable time after the particular episode has closed, and often the caller gives a good deal of information that is not necessary for immediate intervention. In a broader set of cases, the caller’s motives are mixed but she is fully aware that what she says has potential evidentiary value.

Consider, for example, *State v. Davis* [64 P.3d 661 (Wash. Ct. App. 2003)], now on review in the Washington Supreme Court (the same court from which *Crawford* came). The complainant called 911 and, in response to questions by the operator, disclosed that the defendant had beaten her with his fists and then run out the door, further disclosed that she had a protection order against him, and explained the reasons why he had been in her house. The complainant did not testify at trial, and the 911 tape was played to the jury. In closing argument, the prosecutor said, “[A]lthough she is not here today to talk to you[,] she left something better. She left you her testimony on the day that this happened . . . [T]his shows that the defendant, Adrian Davis, was at her home and assaulted her.”

Then the prosecutor played the 911 tape again. Here, the statement has strong claim to be considered testimonial. Davis and cases like it suggest that the 911-call scenario should not be dismissed by broad generalizations about the “typical” case. Rather, a case-by-case assessment is necessary. Indeed, even if a 911 call is nothing but an urgent plea for protection, the court should closely scrutinize it. I will repeat here the analysis that Bridget McCormack [Law School Associate Dean for Clinical Affairs] and I have given:

“To the extent the call itself is part of the incident being tried, the fact of the call presumably should be admitted so the prosecution can present a coherent story about the incident. But even in that situation, the need to present a coherent story does not necessarily justify admitting the contents of the call. And even if the circumstances do warrant allowing the prosecution to prove the contents of the call, those contents generally should not be admitted to prove the truth of what they assert To the extent that the contents of the call are significant only as the caller’s report of what has happened, such a report usually should be considered testimonial.”

b. When are statements by children “testimonial”?

Another type of case that frequently will test the limits of the term “testimonial” involves statements by children, typically alleging some kind of abuse. Suppose, for example, a young child tells a police officer that an adult has physically or sexually abused her. If an adult made such a statement, it would clearly be testimonial. But can a different result occur in the case of a very young child?

At some point, the statement of a very young child may perhaps be considered more like the bark of a bloodhound than like the testimony of an adult human; that is, the child may be reacting to and communicating about what occurred, with no sense of the consequences that her communication may have. Arguably, fidelity to the text and policies of the Confrontation Clause suggests that some degree of understanding of the consequences of the statement is necessary before a declarant may be considered a “witness.” If that is true, the better rule would probably be that a person is not a witness unless she understands that the statement, if accepted, is likely to lead to adverse consequences for the person accused. Under this view, a child could be a witness even if she had no real understanding of the legal

system; it would be enough to know that telling a police officer about a bad thing that a person did would likely cause that person to be punished.

In deciding whether a child is capable of acting as a “witness,” the moral as well as cognitive development of the child may well be material. My colleague [U-M Law School Professor] Sherman Clark has argued that part of what drives the confrontation right is not simply the formal categorization of a person as a “witness,” but also the moral sense of the obligation of an accuser to confront the accused. If he is right — and I believe there is a good deal of force to the argument — then the important question is not only whether the child understands the punitive consequences of the statement, but also “the level of obligation and responsibility we are willing to put on the shoulders of children.”

Even assuming a given child is capable of making a testimonial statement, the fact that the declarant is a child can complicate the question of whether the particular statement should be deemed testimonial. As I suggested earlier, when an adult makes a statement accusing a person of a crime, the statement should be considered testimonial, even though the statement is made to a private individual, if the declarant understands that the listener will pass the information on to the authorities. But consider children’s statements to intermediaries — for instance, a child’s statement to his mother. This situation may be materially different from that of the adult witness, because even a child sufficiently mature to be capable of being considered a witness may have no understanding that the third party will pass the statement on to the authorities.

There are different ways to approach this problem. One view is that the statement is not testimonial if a child in the position of the declarant would not understand that the information would reach the authorities. A second view is that if the child, without understanding the particulars, expects the mother to visit adverse consequences upon the assailant, then the child should be deemed to be testifying within his or her ability to do so. And a third view is that differentiating by maturity is simply inappropriate and unadministrable, so the perspective of a reasonable adult should govern determination of whether a statement is deemed testimonial.

Furthermore, the supplemental standard I have suggested as a possibility in “invited statement” contexts may be appropriate in certain cases involving statements by children. Under that standard, the statement should be deemed testimonial (1) if the investigative nature of the conversation is withheld from the child but (2) it does not appear that the nondisclosure was necessary to procure the statement. Again, the idea is that the investigator should not be allowed to withhold the purposes of her inquiries gratuitously in an effort to defeat the confrontation right — but the complexity of this inquiry gives me some qualms whether this standard should be applied.

Plainly, this is an extraordinarily complex and difficult area, and pending further guidance from the Court it will remain very uncertain.

3. What constitutes an “opportunity for cross-examination”?

Under *Crawford*, the confrontation right presumptively is violated if a statement is considered “testimonial” but the witness does not testify at trial. By contrast, the confrontation right is not violated where the witness is unavailable and the accused has had a prior opportunity for cross-examination. In the wake of *Crawford*, a wise prosecutor, aware of the possibility that a key witness may be unavailable, will often take the witness’s deposition early in the investigation. *Crawford* therefore raises an important question about what constitutes an adequate “prior opportunity for cross-examination.”

For example, suppose a laboratory report is a critical piece of evidence. In most circumstances, the lab report should be considered testimonial, because the report is prepared in anticipation of its introduction at trial. Therefore, the lab technician who made the report should testify at trial if she is available to do so. If she becomes unavailable through no fault of the accused (by accidental death, for example), and the accused has not had an opportunity to cross-examine her, then the report should not be considered admissible.

But if the prosecution takes her deposition — that is, a pretrial examination, subject to oath and cross-examination — and the technician later becomes unavailable, the prosecutor may use the deposition if the deposition presented an adequate opportunity for cross-examination.

Because *Crawford* increases the prosecutor’s incentive to take a deposition, we can expect pressure to amend the rules of criminal procedure in jurisdictions, including at the federal level, in which depositions are not now readily available, and perhaps even to allow depositions before charges have been brought. If a deposition is taken very early, obviously there will often be a question whether it gave the accused an adequate opportunity to cross-examine. Did counsel have enough time to prepare? Did counsel know what issues to press, and have the information at hand that would enable her to do so effectively? The better approach would not be to assume that early opportunities are inadequate per se; in many cases, counsel will have little difficulty, even with limited preparation and even before matters have proceeded very far, determining what questions to ask. Rather, if the defendant had an opportunity to cross-examine the witness at deposition but the witness is unavailable at trial, the confrontation right should not require exclusion unless the defense shows some particular reason to believe the opportunity was inadequate.

One more change in prosecutorial practice may well follow from *Crawford*. Suppose a prosecutor announces an intention to use a witness’ statement and invites the defense to demand a deposition of the witness if it wants to be assured of cross-examining the witness. If the defendant does not make the demand, the witness is unavailable at trial, and the prosecution offers the statement, would this procedure suffice to protect adequately the “opportunity for confrontation”? Perhaps, by not making the demand though being warned of the possible consequences, the defendant would be deemed to have waived the confrontation right. Or perhaps the procedure would be consid-

ered a violation of the accused's passive right to do nothing and "be confronted with" the witnesses against him. We may never know for sure unless the procedure is tried.

4. What constitutes "forfeiture"?

The idea that the accused cannot claim the confrontation right if the accused's own misconduct prevents the witness from testifying at trial is a very old one. *Crawford* explicitly reaffirms it, and justifiably so.

Forfeiture often raises difficult issues. If a witness is murdered shortly before she was scheduled to testify against the accused, what showing of the accused's involvement does the prosecution have to make? Is it enough that the accused acquiesced in the wrongdoing? And how is participation or acquiescence to be determined; is the mere fact that the accused benefited from the murder enough to raise a presumption that the accused acquiesced in it?

One issue on which *Crawford* gives little or no guidance may be expected to become particularly pressing now. Suppose the wrongful act that allegedly rendered the witness unavailable is the same act with which he is charged. May the act nevertheless cause a forfeiture of the confrontation right? For example, suppose the accusation is of child sexual abuse and the prosecution argues that the abuse itself has intimidated the child from testifying in court (though she previously made a statement describing it). Or suppose the accusation is of murder, the prosecution contending that the accused struck a fatal blow and that the victim made a statement identifying the accused and then died?

The first reaction of many observers is that in such situations forfeiture would be bizarre. And yet, for reasons I will summarize briefly, I believe that in some circumstances it is appropriate. In post-*Crawford* cases, two state supreme courts [Colorado and Kansas] have agreed.

The objection most frequently made to applying forfeiture doctrine in situations of this sort is that it is bootstrapping: The accused is held to have forfeited the confrontation right on the ground that he or she committed the very act on which the trial centers — an act that he or she is accused of committing, but denies committing and is presumed not to have committed. On closer analysis, I do not believe the objection carries weight. The situation is analogous to the one that often arises when a defendant is accused of conspiracy and the prosecution argues that the hearsay rule poses no bar to admission of a statement made by a conspirator in support of the conspiracy. In each of these cases, the same factual issue — the defendant's participation in the conspiracy in the one case, and his commission of the wrongful act that rendered the witness unavailable in the other — may arise as a threshold matter for evidentiary purposes and when determining guilt, but so what? The issue will likely be decided for the two different purposes by different fact-finders — the judge deciding threshold evidentiary matters and the jury determining guilt — and on different factual bases.

Another objection is that presumably the crime was not committed for the purpose of rendering the witness unavailable. But again I respond with a shrug. The point of forfeiture doctrine

is that the accused has acted wrongfully in a way that is incompatible with maintenance of the right. Suppose that an informer makes a statement to the police describing a drug kingpin's illegal activities. But the informer stays undercover and, before the kingpin knows anything about the statement, the two get into a fight over a card game. The kingpin goes to a closet, pulls out a gun, and murders the informer. If the kingpin is tried on drug charges and the prosecution wants to introduce the informer's statement, the kingpin should not succeed in arguing, "But I haven't had a chance to cross-examine him." The appropriate response is, "And whose fault is that? You murdered him."

As interpreted in this way, forfeiture doctrine can solve one of the puzzles of the confrontation right. The *Crawford* Court accurately noted that the "dying declaration" exception is the only exception commonly applicable to testimonial statements that had been well established at the time of the Sixth Amendment's adoption in 1791. The Court then said, with apparently studied ambiguity, "If this exception must be accepted on historical grounds, it is *sui generis*." It seems highly unlikely that the Court would generally exclude statements that fit within the dying declaration exception, thus achieving a remarkably unappealing evidentiary result that courts have avoided for several hundred years.

On the other hand, admitting these statements on the ground suggested by the Court raises problems of its own. It obscures the clarity of the principle adopted by *Crawford*, that if a statement is testimonial it cannot be introduced against the accused unless he had an opportunity to cross-examine the witness. And it does so on very weak grounds, for (as noted above) the rationale generally cited for the dying declaration exception is absurd. A far better resolution would be to recognize that, however the admissibility of dying declarations usually has been defended, it really is best understood as a reflection of the principle that a defendant who renders a witness unavailable by wrongful means cannot complain about her absence at trial. That principle also explains, incidentally, why (1) the hearsay exception for dying declarations is limited to those that describe the cause of death, and (2) the declaration will not be admitted unless death appeared imminent at the time the declaration was made.

C. *Crawford's* impact on non-testimonial statements

If a statement is deemed not to be testimonial, what is the impact of the Confrontation Clause? *Crawford* does not resolve the matter. The theory of the opinion suggests, and the Court explicitly preserves the possibility of, "an approach that exempted such statements from Confrontation Clause scrutiny altogether." But, in an apparent compromise, the Court also indicated that *Roberts*, or some standard even more flexible, might also be applied in this context. Numerous post-*Crawford* courts, having determined the statements at issue were not testimonial, have gone through the *Roberts* analysis and — not surprisingly — determined that the statements were admissible. It is easy enough to see why a court disposed to admit a statement would follow this approach: If instead the court held that the Confrontation Clause did not

apply at all to non-testimonial statements, it might leave itself vulnerable to reversal if a higher court held that *Roberts* continues to apply to such a statement. So it is prudent to run through the *Roberts* analysis, which a court can always find is satisfied if it wants to (that being one of the problems with *Roberts*.) No terrible harm is done, perhaps, but the process is wasteful, because courts will continue to run through it with predictable results. Until a prosecutor is brave enough to press the point, it is doubtful that there will be a clear test in the Supreme Court on the proposition that outside the context of testimonial statements, the Confrontation Clause has no force.

Conclusion

Plainly, *Crawford* leaves open many very important questions. In particular, the impact of the opinion may be very different depending on whether the Supreme Court adopts a broad or narrow understanding of the term “testimonial.” But what is most important is that the jurisprudence of the Confrontation Clause, after a long detour, has been set on the proper course. This means that the discourse can be rational and candid. Rather than manipulating unanswerable questions as to whether a given statement is sufficiently “reliable” to warrant admission, the courts will be asking whether admission violates the time-honored and constitutionally protected right of a criminal defendant to insist witnesses against him testify subject to cross-examination.

Even in the pages of this journal, I am willing to confess that I am not a strict originalist in constitutional interpretation. I believe that there are some questions of constitutional law that cannot be answered most usefully by asking what the public meaning was of the constitutional text at the time it was adopted, or what the intention of the Framers was. But in this context, all indications are in alignment. The historical background shows that the meaning of the text and the intention of the Framers are quite clear, and the unequivocal procedural rule on which they insisted continues to resonate today as one of the central aspects of our system of criminal procedure. The *Crawford* Court properly said, “By replacing categorical constitutional guarantees with open-ended balancing tests, we do violence to their design.” The Constitution does not always speak in terms of categorical guarantees, but when it does, as in the case of the Confrontation Clause, it should be heeded. Give credit to the Court for disenthraling itself from a doctrine that had grown familiar but had no basis in the Constitution and was utterly unsatisfactory, and for recognizing the essence of the confrontation right.

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